CHAPTER 7: COLLECTIVE BARGAINING

Background

In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.

However, collective bargaining is constrained by the Act. Section 45 prohibits collusive conduct in the form of contracts, arrangements or understandings having the purpose or effect of substantially lessening competition. Section 45A(1), in effect, deems a price fixing agreement to be in breach of section 45. Accordingly, any agreement between competitors to fix, control or maintain prices for goods or services is prohibited regardless of its purpose or effect on competition. Sections 45A(2) and 45A(4) provide joint ventures and joint buying groups with a limited exception from the per se prohibition imposed by section 45A(1), but section 45 continues to apply so that any pricing arrangements are still prohibited if they substantially lessen competition. Section 51(2)(a) exempts collective bargaining, for example by trade unions, in relation to remuneration, conditions of employment, hours of work or working conditions of employees.

Under sections 45 and 45A, collective bargaining might amount to a prohibited price fixing agreement. For example, a group of primary producers joining together to negotiate terms of sale for produce might be entering into a price fixing agreement in breach of section 45.

Section 45 also prohibits any contract, arrangement or understanding which contains an exclusionary provision. The aim of this provision is to prevent, inter alia, collective boycotts, which involve the deliberate exclusion of a person from participating in a market. An exclusionary provision is defined by section 4D as a provision of a contract, arrangement or understanding between at least two or more parties who are competitive with each other which prevents, limits or restricts the freedom of the parties to deal with certain persons or classes of persons.

A collective bargaining arrangement involving the possibility of a collective refusal to deal with a person or class of persons might amount to an arrangement to engage in a collective boycott and be an exclusionary provision.

Under sections 88 and 90, collective bargaining may be authorised by the ACCC where it is satisfied that the public benefit would outweigh the detriment constituted by any lessening of competition that would result or be likely to result. Authorisation takes a collective bargaining arrangement outside the provisions of sections 45 and 45A. The operation of the authorisation process is outlined in Chapter 6.

By way of contrast to authorisation, section 93 of the Act provides for the notification of exclusive dealing which, were it not for the notification, would be in breach of section 47. Once a notification has been lodged, the conduct which is the subject of the notification is deemed not to have the effect of substantially lessening competition for the purposes of section 47. The result is, except in relation to conduct falling within sections 47(6), (7), (8)(c) and (9)(d) where the lessening of competition is not relevant, that there is statutory protection for the conduct in question. The ACCC can withdraw the protection under section 93(3) by giving notice if it is satisfied that the conduct is likely to have the effect of substantially lessening competition and that in all the circumstances no public benefit has resulted or is likely to result from the conduct or any public benefit would not outweigh the detriment constituted by the lessening of competition. The ACCC must afford the opportunity for a conference amongst interested parties by preparing a draft notice. If the ACCC decides to withdraw the protection, it ceases 30 days after the ACCC gives notice of its decision. The ACCC has power to extend, but not reduce, that period.

The procedure is slightly different for third line forcing under section 47. In that case the notification does not take immediate effect, but takes effect 14 days later or on the date on which the ACCC advises the applicant that it has decided not to give notice that the public detriment of the conduct outweighs the public benefit, whichever occurs first.

Issues

Dissatisfaction was expressed in a number of submissions with the process of authorisation. These concerns are described in Chapter 6 which addresses some of the suggestions made to improve the authorisation process. This Chapter addresses the suggestion that a notification process should be created

for collective bargaining by small businesses, which would be modelled on the notification process available for exclusive dealing.

The Committee also received submissions on behalf of co-operative organisations arguing that the Act does not recognise the pro-competitive nature of the co-operative structure, in which small businesses may co-operate to compete against larger businesses. The co-operative federations variously argued in support of a notification process, the simplification of the authorisation process or an exemption from the competition provisions of the Act (particularly in the case of agricultural co-operatives).

Analysis

The Committee is of the view that there is much to be said for the retention of some kind of authorisation process for collective bargaining by small businesses. Whilst the procedure may be lengthy and expensive, any decision to allow collective bargaining constitutes an exception to the basic thrust of the Act. The Act prohibits price fixing per se because competition in prices is the primary means of competition amongst businesses and is central to economic efficiency. Differences in prices assist consumers and businesses in making choices between competing products. They also assist decisions about resource allocation by indicating where there is an incentive for new investment. The Act does allow the authorisation of conduct involving price fixing where it is in the public interest to do so, but whether such a departure from its central aim of fostering competition is justified may be thought to require careful consideration on a case-by-case basis. The authorisation process provided by the Act involves such an approach.

The current per se prohibition of price fixing is justified on the basis that the occurrence of price fixing agreements that enhance efficiency is likely to be rare, because a per se test is easier to enforce than a substantial lessening of competition test and because such clear rules generate certainty. The per se treatment is qualified by provision for the authorisation of appropriate conduct. The authorisation process allows the public benefits of behaviour that is potentially anti-competitive to be considered and evaluated on a case-by-case basis.

As noted in Chapters 1 and 6, legislative reform over the last decade designed to foster competition has resulted in a greater part of the Australian economy becoming subject to Part IV of the Act. Modification of the authorisation process to facilitate collective bargaining should not constitute a reversal of these reforms. For example, if notification were to be introduced as an

alternative to authorisation, it should not be allowed to become a de facto mechanism for the re-establishment of the statutory marketing arrangements. Notification should not be seen as an alternative form of industry policy.

A distinction has been drawn between collective bargaining and behaviour amounting to a primary boycott, or exclusionary conduct. The ACCC apparently takes the view that primary boycotts can significantly increase the anti-competitive effect of collective bargaining arrangements. The Committee is unclear whether the ACCC would view a collective bargaining agreement between buyers to refuse to buy from a supplier in the absence of a satisfactorily negotiated price as a primary boycott, but it would seem to the Committee to be an integral part of such an agreement.

The Committee does not accept the submission that collective bargaining by small business be exempted altogether from the provisions of Part IV of the Act. This would have the effect of removing a substantial part of the Australian economy from the operation of this aspect of competition law and would effectively reverse many of the reforms achieved over the last decade. There would be no assessment of the public interest in relation to activities undertaken within the exception. An unfettered ability to bargain collectively would allow anti-competitive and undesirable conduct.

The general exemption provided in the Act for collective bargaining and collective agreements on employment conditions does not provide an appropriate precedent for small business. Collective bargaining between employees and employers is subject to detailed regulation under industrial relations legislation which has developed over many years. If small business were granted a general exemption from the Act, it would operate without the checks and balances governing collective bargaining under industrial law.

Notwithstanding the advantages of authorisation, on balance, and having regard to the ACCC's preference for it, the Committee considers that a notification process, along the lines of the process for notifying exclusive dealing, should be introduced for collective bargaining by small business in addition to the existing authorisation process. It would, in the view of the Committee, provide a speedier, simpler and less expensive mechanism.

Notification process

The purpose of a notification process of the type proposed would be to provide a speedy and simple means of enabling small businesses to take themselves outside the provisions of Part IV of the Act in order to be able to bargain collectively with businesses possessing a large degree of market power.

The process would have to be confined to small business in negotiation with big business where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit. Some definition of a small business would be required.

There appear to be two main approaches to the definition of a small business. One uses the features of the business — for example, turnover, employee numbers or ownership structure — and the other makes reference to the value of the transactions involved. The latter approach is adopted in section 51AC of the Act. That section imposes a prohibition against unconscionable conduct in connection with transactions involving a price of $3 million or less. The protection is not extended to public listed companies and the amount of $3 million may be varied by regulation.

In the Committee's view the transaction value approach is the preferable one for restricting the notification process for collective bargaining to small businesses. It is administratively simple and requires no intrusive investigation as may be the case with a business features test. Notification would be restricted to an arrangement under which only businesses that supply or acquire goods or services at less than the maximum amount per annum could participate. An amount of $3 million is included in the Act to define transactions by small business under the unconscionable conduct provisions. A similar amount could be specified for this purpose but the Committee suggests that it be variable by regulation in the light of experience. The total value of the collective bargaining arrangement would be well above the maximum amount for individual businesses and would depend on the number of businesses participating. Such an approach would be consistent with the approach already adopted by the Act. A disadvantage identified by the ACCC is that a greater number of businesses that were not small businesses might be eligible to participate in a notified arrangement than would be the case under a business features test. However, the ACCC would be able to rely on its public benefit assessment to screen out inappropriate collective bargaining arrangements.

Whilst the notification of collective bargaining arrangements should be available only to small business, it should also only be available in the public interest where it is big business on the other side with whom the bargaining is to take place, that is to say, where there is a corporation with a substantial degree of market power. The ACCC submits that, rather than make the degree of market power an eligibility criterion, it should form part of that body's assessment of the notification to determine whether the notified conduct would result in a net public benefit. The Committee accepts this submission.

Such a procedure would allow the issues of market power and competition to be considered together.

The ACCC also proposes that the notification process for collective bargaining should not provide immunity from the prohibition imposed by section 45 against primary boycotts. As noted above, collective bargaining, of its nature, may involve a collective boycott and the Committee would not favour such a restriction. Whether, in the circumstances, a particular form of boycott might not be in the public interest, would be for the ACCC to assess after notification. Such an arrangement could, of course, be the subject of an application for authorisation.

There are other qualifications suggested by the ACCC. It submits that the notification should not come into effect until 30 days after the notification is lodged to ensure that it has sufficient time to assess the likely effect of the notified conduct. It also proposes that it should be able to extend the 30 day period to 90 days. The Committee is of the view that to allow such periods would be to impair the speedy and effective nature of the process. With the notification of third line forcing, there is a delay of 14 days before the notification takes effect, and the Committee believes that 14 days would be sufficient in the case of small business notifications. If the notification process were used to implement highly anti-competitive arrangements, the protection afforded could, under the proposed legislation, be withdrawn by the ACCC.

The ACCC submits that, if a fee is to be charged for notification, it should be substantially less than the fee charged for an application for authorisation. The Committee agrees with that submission. It also agrees with the submission that immunity under the notification should, in the absence of withdrawal, last for three years, after which the parties would have to lodge a new notification if they wished the immunity to continue.

It was also submitted that the utility of a notification process would be increased if provision were made for notification to be sought on behalf of a group by a third party. This might be relevant, for example, to rural producers who may wish to bargain through the structure provided by an industry body. The Committee also considers that it would be appropriate to allow a third party to apply for a notification on behalf of a group.

While the Committee has not made particular recommendations with respect to the medical profession, members of that profession would be able to avail themselves of a notification process for collective bargaining were such a process to be introduced.

Similarly, that process would be available to co-operatives in appropriate circumstances. Of course, the authorisation process would remain available and proposals for the modification of that process are dealt with in Chapter 6. The Committee would not favour the exemption of co-operatives from the competition provisions of the Act.

Conclusions

- Collective bargaining by small business should not be exempted altogether from the provisions of Part IV.
- As an alternative to authorisation, a notification process should be provided to assist small business, including co-operatives which meet the definition of small business, in dealing collectively with large businesses where the collective bargaining may generate public benefit.
- A definition of small business, based on the value of the transaction undertaken, is desirable to confine access to the notification process to small business.

Recommendations

7.1 A notification process should be introduced, along the lines of the process contained in section 93 of the Act, for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business.

7.2 A transaction value approach should be adopted to provide a definition of small business. Initially the amount of transactions should be set at $3 million but be variable by the Minister by regulation.

7.3 A period of 14 days should be required to elapse before a notification takes effect.

7.4 Provision should be made for third parties to make a collective bargaining notification on behalf of a group of small businesses.